

United States Bankruptcy Court

For the NORTHERN District of IOWA

IN RE:

DOUGLAS A. NEUHAUS,

Debtor.

Case No. 87-01187W

FILED
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

MAY 27 1988 *LM*

JUDGMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable ^{BARBARA A. EVERLY, CLERK} William L. Edmonds, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

[OR]

☐ The issues of this proceeding having been duly considered by the Honorable William L. Edmonds, United States Bankruptcy Judge, and a decision having been reached without trial or hearing.

IT IS ORDERED AND ADJUDGED:

Charles Williams, Jr. and Marie Williams are allowed as an administrative expense under 11 U.S.C. § 503(b)(1)(A) the sum of \$14,400.00; Douglas A. Neuhaus shall pay to the Williams that amount.



VOL. II
Page 78

BARBARA A. EVERLY
Clerk of Bankruptcy Court

copies mailed with Order of Decision, 5-27-88, LM
[Seal of the U.S. Bankruptcy Court]

Date of issuance: 5-27-88

By: Larry McElroy
Deputy Clerk

See Satisfaction of Judgment

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

FILED
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

JUN 23 1988

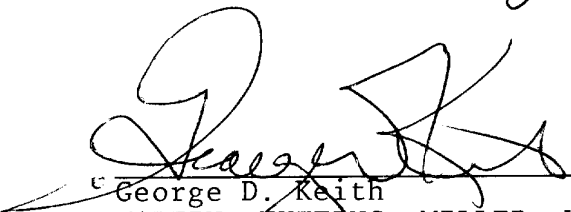
IN RE:) CHAPTER 12
DOUGLAS A. NEUHAUS,)
Debtor.) BANKRUPTCY NO. 87-01187W
CONTESTED NO. 71511

BARBARA A. EVERLY, CLERK

SATISFACTION OF JUDGMENT

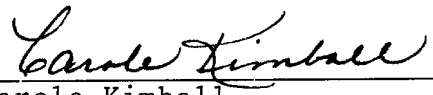
COMES NOW Charles Williams, Jr. and Marie Williams by their attorney, George D. Keith, and hereby acknowledge receipt and satisfaction in full of the above entitled judgment, interest and costs.

DATED at Waterloo, Iowa this 22nd day of June, 1988.


George D. Keith
MARTIN, NUTTING, MILLER, KEITH
& PEDERSEN
Suite 710, 501 Sycamore Street
P. O. Box 2158
Waterloo, Iowa 50704

STATE OF IOWA, COUNTY OF BLACK HAWK) ss.

On this 22nd day of June, 1988, before me, the undersigned Notary Public in and for the State of Iowa, personally appeared George D. Keith, named in and who executed the foregoing instrument, and acknowledged the execution of said instrument to be his voluntary act and deed as Attorney for Charles Williams, Jr. and Marie Williams herein, and in that capacity by said Williams and by him voluntarily executed.


Carole Kimball
Notary Public in and for the
State of Iowa

Copy mailed to
filing attorney

RECORDED: Vol II
Page 78

JUN 27 1988

gk

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE NORTHERN DISTRICT OF IOWA

FILED

MAY 27 1988

IN RE:

DOUGLAS A. NEUHAUS,

Debtor.

)
)
)

CHAPMAN & ELLERLY, CLERK
 Bankruptcy No. 87-01187W
 Contested No. 71511

MEMORANDUM OF DECISION RE:
APPLICATION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATION EXPENSE
and MOTION FOR ADEQUATE PROTECTION

Contract vendors of farm real estate seek the allowance and payment as an administrative expense of the 1987 rental value of the farm property because of the debtor's use of the farm during the Chapter 12 reorganization. This application is resisted by the debtor. Vendors also seek adequate protection under 11 U.S.C. § 1205(b)(3). Debtor also resisted this application.

This administrative claim was heard by the court on March 10, 1988 in Waterloo, Iowa. At that time, counsel for the parties requested the matter to be submitted on the evidence introduced at the hearing on confirmation of the debtor's plan on November 17, 1987. Counsel also have orally argued and have submitted briefs. The contested matter on the Motion for Adequate Protection was argued in a telephone conference on April 29, 1988, on the same evidence.

The court now issues this memorandum of decision and ruling which shall constitute Findings of Fact and Conclusions of Law as required by Bankr. R. 7052.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

1. Douglas A. Neuhaus filed his individual voluntary petition under Chapter 12 of the Bankruptcy Code on May 18, 1987.

2. Neuhaus listed the following secured creditors and debts on his bankruptcy schedules: State of Iowa in the amount of \$3,850.00 for a loan used to terrace the farm property; his father, Henry J. Neuhaus, in the amount of \$64,862.00 for a loan to the debtor used as a down payment on the purchase of the farm; and Charles Williams, Jr. and Marie Williams (the Williams or vendors) as vendors on a farm real estate contract. Butler County, Iowa was scheduled as a \$4,200.00 priority creditor for real property taxes on the farm premises. The only unsecured creditors scheduled by the debtor were his parents, Henry J. and Wilma J. Neuhaus.

3. Neuhaus purchased the farm real estate by an installment real estate contract executed between himself and the Williams on October 8, 1979.

4. The 160-acre property is described as:

The East one-half (E-1/2) of the Southwest quarter (SW-1/4) and the West one-half (W-1/2) of the Southeast quarter (SW-1/4) of Section Nine (9), Township Ninety-one (91) North, Range Fifteen (15) West of the 5th P.M., Butler County, State of Iowa.

5. The parties used an Iowa State Bar Association form which among other things provided the following:

(a) that the buyer would enter into possession on March 1, 1980, and would remain in possession so long as he performed his obligations under the contract;

(b) a forfeiture remedy to the vendors under Iowa Code Chapter 656;

(c) a foreclosure remedy to the vendors.

6. Terms of payment under the contract were clarified by a "rider" attached to the contract which required the debtor to make semi-annual payments each March 1 and September 1. Beginning March 1, 1985, the semi-annual payments were to be \$15,400.00, including interest.

7. Debtor failed to pay the March 1, 1987 payment.

8. The March 1, 1987 payment was still delinquent when debtor filed his Chapter 12 bankruptcy on May 18, 1987. Vendors determined to forfeit the contract under Iowa Code chapter 656, but failed to serve notice of forfeiture before the bankruptcy case was filed.

9. After the filing of the Chapter 12 case, and while in default, debtor planted 91 acres of corn and eight acres of oats. Forty-nine acres of the farm were devoted to a set-aside program.

10. A house and buildings are located on the farm. The house was occupied for a time during the reorganization case by debtor's brother. The farm buildings were being used by the debtor in his farm operation.

11. On June 3, 1987, Williams filed an "Application to compel assumption or rejection of executory contract." Williams alleged the delinquency of the March 1, 1987 payment and the debtors failure to pay real estate taxes. Williams alleged also they had lost an opportunity to lease the land at \$110.00 per acre for the

1987 crop year. Williams requested the court to set a time within which the debtor was to apply for permission to assume or reject the contract and that if the debtor made application to assume the contract that he also cure any deficiencies and give adequate assurance for future compliance with the contract. Williams also asked that should an application for rejection be sought by the debtor, that the debtor be required to surrender the premises.

12. A hearing on the motion was held March 24, 1987. The bankruptcy court ordered assumption or rejection by the debtor by August 17, 1987. On August 3, 1987, the court issued an expanded order with regard to the Williams' application. The order said as follows:

IT IS THEREFORE ORDERED Debtor shall on or before 4:30 p.m. on August 17, 1987, file herein their statement which may be made as part of their plan indicating assumption or rejection of the Williams Neuhaus contract.

Should the statement or plan indicate assumption, the current default shall be cured or adequate assurance of a prompt cure and adequate assurance of future performance shall be provided.

In the event the statement or plan provides for rejection of the contract, or in the event no such statement or plan is filed by the date set the contract shall be deemed rejected by the Debtor, in which case the automatic stay shall be deemed lifted such that applicant herein may take steps to obtain Title to the real estate as well as possession of same.

Neither party to the contract appealed the order.

13. On August 17, 1987, the debtor filed his "Original Chapter 12 plan". Neuhaus referred to the Williams' contract in Article II, paragraph 3(a) of the plan. The paragraph contained

the following statement:

He [Neuhaus] hereby assumes the real estate contract for the purchase of farm land from Charles Williams, Jr. and Marie Williams and provided this Plan is confirmed by the Court, he will make payment of all delinquent amounts required in the performance of the contract, thereby curing the current defaults. He now offers and provides adequate assurance of such performance and the source of funds to enable him to do so will be by borrowing from . . . family members.

14. Article II, paragraphs 5 through 8 further detailed the assumption and adequate protection proposal. They are set out in full as follows:

5. ASSUMPTION OF CONTRACT CLAUSE. Debtor assumes the real estate contract dated October 8th, 1979 by and between Charles Williams, jr. and Marie Williams, vendors, and Douglas A. Neuhaus, vendee, describing real estate, as follows:

The East One-half (E1/2) of the Southwest Quarter (SW1/4) and the West One-half (W1/2) of the Southeast Quarter (SE1/4) of Section Nine (9), Township Ninety-one (91) North, Range Fifteen (15) West of the 5th P.M., subject to roadways and easements of record,

which is executory and requiring further performance upon the part of both vendors and vendee. With respect to servicing the indebtedness evidenced by said contract owed on the part of this Debtor, he plans and agrees to pay all installments of principal and accrued interest as the same become due and payable in accordance with the terms of said contract commencing March 1st, 1988, and continuing such payments until the expiration of this Chapter 12 Plan period as provided by Section 1222(c).

6. DEFERRED PAYMENTS. Debtor requests Charles Williams, Jr. and Marie Williams to defer the installments of principal and interest due and payable March 1st, 1987 and September 1st, 1987 by adding the amounts thereof, plus accrued interest, to the unpaid principal balance outstanding and due and payable March 1st, 1999. This is a request for indulgence only and is not a mandatory provision of this Plan and Debtor acknowledges that acceptance or rejection thereof is entirely within the discretion

and power of said contract vendors.

7. ADEQUATE PROTECTION. Debtor, having made full and complete disclosure in support of this Plan, now further offers to provide adequate protection to claimants, Charles Williams, Jr. and Marie Williams, contract vendors, by causing the payment to them for the use of the farm land \$110.00 per acre, or \$17,600.00 per annum, which he believes is in excess of reasonable rent customary in the community where the property is located based upon the rental value, net income and earning capacity of the property. This is offered and proposed as part of a reasonable Plan to enable him to reorganize under Chapter 12.

8. ALTERNATIVE. In the event this Plan is not ultimately confirmed in its present form, or as amended, Debtor proposes that the farm and its appurtenances be leased to him on an annual basis commencing with the amount of rental as specified above and that such lease be in the form as approved and published by the Iowa State Bar Association. As part of this Alternative, if accepted by said contract vendors and as a part thereof, they will agree to give Debtor a right of first refusal to purchase said farm land equal to a third party bona fide offer and which right shall continue for a period of five years from the date of the lease.

15. Williams, on August 28, 1987, filed an "Objection to Chapter 12 plan, motion to lift stay and to prevent harvest pending hearing on same," which was identified as Contested No. 71241.

Williams alleged that the plan provisions relating to the contract failed to meet the requirements of the court's August 3 order. Further, Williams raised their concern that the crop would be harvested prior to any hearing date on their motion for relief from stay. Williams prayed that the plan be rejected, that the stay be "lifted," and pending hearing on the motion for relief debtor be prohibited from harvesting any crop on the contract land.

16. Neuhaus filed a resistance to the motion on September 2, 1987.

17. As a result of the Williams' motion, a telephonic preliminary hearing on the motion for relief from stay was held September 18, 1987. The court ordered Neuhaus to cure the default in connection with the real estate contract "by no later than noon, September 25, 1987." Cure was defined as the payment of the installments due March 1 and September 1, 1987 plus accrued interest. The court further provided that if default were not cured by that date the automatic stay would lift without a further order of the court upon the filing of an affidavit by Williams' attorney setting out the failure to cure. This order was not appealed by either party to the contract.

18. An affidavit of default was filed by Williams' attorney on September 28, 1987.

19. Further hearing was held on Contested No. 71241 (Williams' motion for relief) on October 1, 1987, and the undersigned judge ruled that the hearing was unnecessary because the stay had been lifted upon filing of the affidavit pursuant to the court's August 3, 1987 order.

20. The corn crop planted on the land matured approximately September 20, 1987, and was harvested between October 28 and 30, 1987.

21. Williams filed a "objection to initial confirmation order" on October 15, 1987, alleging under paragraph 4 that "Bankruptcy Code § 1205(b)(3) requires Debtor to pay these Creditors [Williams] reasonable rent for the use of the farm land for the 1987 crop year." Neuhaus resisted the objection by a filing on

October 22, 1987 which argued that there was no basis for the payment of rent to the Williams. Neuhaus argued that his plan's offer of adequate protection (Article I, paragraph 7) was rejected by Williams.

22. On October 22, 1987, Neuhaus filed an amended and substituted plan and described the status of Williams' claim under Article II, paragraph 3 and its sub-sections. In those paragraphs, he alleged having planted the crop after the filing of the bankruptcy case and further stated that the corn crop had matured prior to September 23, 1987.

23. Under Article III, paragraph 5(b) Neuhaus indicated that there would be no payments to Williams under the plan. Article III(e) stated that Neuhaus' rights in the contract property were limited to the value of his equity of redemption and other statutory possessory rights.

24. On November 10, 1987, Williams filed their objection to the amended and substituted plan; the essence of the objection was that the Williams were entitled to reasonable amount of rent to be paid by Neuhaus as a result of his use of the real estate for the 1987 crop year.

Williams stated:

2. The course of this proceeding has effectively put Creditors Charles and Marie Williams and Debtor in a landlord-tenant relationship for the 1987 crop year.

25. On November 13, 1987, Williams filed a motion with regard to the farm ground, asking that the court order adequate protection to the Williams in the sum of \$19,200.00. The essence of the

motion for adequate protection consisted of the following four paragraphs:

4. That because of debtor's use of this land during the pendency of debtor's Chapter 12 proceeding, the estate will have received approximately \$42,000.00 more income than it would have received without use of the property which is the subject of the contract, and claimants are entitled to payment of an administrative expense, pursuant to 11 U.S.C. § 503(b)(1)(A) equal to the fair rental value of the property.

5. That debtor's filing of this Chapter 12 and the automatic stay resulted in the loss to movants of any rent for the property for farm year 1987, a property interest of the movants which is entitled to adequate protection under 11 U.S.C. § 362 and § 363.

6. That if adequate protection is required, the Court may and should order the debtors to pay movants reasonable rent customary in the community where the property is located.

7. That the reasonable rental value of the property which is the subject of the contract is \$19,200.00.

26. Hearing was held on the debtor's amended plan of reorganization on November 17, 1987. On February 19, 1988, the court entered its order denying confirmation.

27. On November 13, 1987, Williams filed their proof of claim in the amount of \$183,300.00 alleging that said sum was the unsecured portion of the debtor's obligation under the installment contract.

28. Williams filed a "claim for administrative expense" alleging that debtor had filed his Chapter 12 on May 18, 1987, and thereafter had used the property while in default under the contract. Williams also alleged that because of debtor's use of the land during the Chapter 12 proceeding, the estate was enriched by \$42,000.00 or more in income and that they were entitled to

administrative claim under 11 U.S.C. § 503(b)(1)A). Williams sought \$17,600.00 in cash rent for the farm excluding the house and barn and further said that the fair rental value of the house and barn from the filing of the case in May of 1987 to the date of the filing of the administrative claim was between \$1,500.00 and \$1,800.00.

29. On December 30, 1987, Williams filed their request for payment of the administrative claim and the request was set for hearing for March 10, 1988.

30. Neuhaus testified that the farm had 148 tillable acres, and that in his opinion the farm had a fair rental value of \$90.00 per acre. He also testified that the house on the farm had a separate fair rental value of \$150.00 per month. Neuhaus had no idea as to the fair rental value of the barn.

31. Mr. Williams testified that the fair rental value of the farm was in his opinion \$110.00 per acre for 160 total acres plus rental for the house, plus approximately \$50 to \$100 per month fair rental value for the barn. Williams, however, was quite uncertain as to the barn's rental value, and was contradictory as to whether an offer received by him for the farm included the barn.

32. The court finds that the fair rental value of the farm including house, barn and bin for the 1987 crop year was \$14,400.00 (160 acres at \$90 per acre).

33. At the time of the hearing, gross earnings for Neuhaus from the farm, including set-aside payments and crop, was expected to be \$34,500.00.

34. Williams forfeited Neuhaus' interest in the contract pursuant to Iowa Code Chapter 656 prior to the hearing on the application for administrative expense.

DISCUSSION

The Williams seek compensation for the use of the farm property during the 1987 crop year as the administrative expense payment under 11 U.S.C. § 503(b)(1)(A) or as adequate protection under 11 U.S.C. § 1205(b)(3).

Williams ask for fair rental value of the property. Their request is grounded basically on two arguments:

(1) that the estate benefited by the use of the property during the course of the Chapter 12 proceeding and to the extent the estate or debtor-in-possession received the benefit of the property after the filing of the case, it should pay for that benefit as an administrative expense; and

(2) that the vendors lost the opportunity to rent the premises and that this loss should be compensated under 11 U.S.C. § 1205(b)(3).

I.

To determine the right of the Williams to an administrative expense claim for the use of the property during the Chapter 12 proceeding, requires a brief analysis as to the position of the parties to the contract under Iowa law. Butner v. United States, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed. 2d 136 (1979).

Under an installment real estate contract in Iowa, the vendor retains legal title as security for the payment of the purchase price, while equitable title is vested in the purchasers. Junkin v. McClain, 221 Iowa 1084, 265 N.W. 362, 365, (1936).

The interest acquired by the vendee is real estate while the right of the vendor under the contract is personalty. Wood v. Schwartz, 212 Iowa 462, 236 N.W. 491, 494 (1931).

"The seller has effectively divested himself of all interest in the property except the right to collect the purchase price." Fellmer v. Gruber, 261 N.W.2d 173, 174 (Iowa 1978).

In Iowa the vendor, upon default, has an assortment of remedies.

He may seek damages. Prichard v. Mulhall, 127 Iowa 545, 103 N.W. 774 (1905).

He may seek rescission. Gordon v. Pfab, 246 N.W.2d 283, 287 (Iowa 1976).

The vendor may foreclose the contract as a mortgage. Iowa Code § § 654.11 and 654.12. If the contract is foreclosed, the property is sold in an effort to satisfy the obligation under the contract. The sale may result in a deficiency debt on the contract obligation.

If the contract provides for forfeiture, the contract may be forfeited under Iowa Code Chapter 656. Iowa Code § 656.1.

Under forfeiture, if the vendor cancels the contract, he may retain all prior payments and regains possession of the real property including improvements.

The Williams' contract specifically provided the options of forfeiture or foreclosure to the vendors.

Under the contract, Neuhaus had an equitable interest in the real estate and also possession of the real property.

II.

Upon the filing of the bankruptcy by the vendee, vendee's interest becomes property of the estate. 11 U.S.C. § 541(a)(1) and 11 U.S.C. § 1207(a).

Upon the filing of a case under Chapter 12 of the Code, a debtor in possession has the powers of a Chapter 11 trustee and may operate the debtor's farm. 11 U.S.C. § 1203.

A trustee, under 11 U.S.C. § 363(c)(1) may use property of the estate in the ordinary course of business without notice or hearing.

The debtor-in-possession, subject to certain limitations and exceptions and with court approval, may assume or reject any executory contract of the debtor. 11 U.S.C. § 365(a).

His right to assume or reject an executory contract may be exercised by the debtor-in-possession at any time before confirmation of a plan. 11 U.S.C. § 365(d)(2).

However, upon the request of a party to the contract, the court may order the debtor-in-possession to determine within a specified period of time whether to assume or reject the executory contract. 11 U.S.C. § 365(d)(2).

If the executory contract is in default, the debtor-in-

possession may not assume the contract unless at the time of the assumption, the debtor-in-possession takes certain curative actions. He must cure default or provide adequate assurance that he will promptly cure any default. 11 U.S.C. § 365(b)(1)(A).

The debtor-in-possession must compensate or provide adequate assurance that he will promptly compensate the party to the contract for any actual pecuniary loss resulting from the debtor's default. Also he must provide adequate assurance of future performance under the contract. 11 U.S.C. § 365(b)(1)(B) and (C).

"The assumption of an executory contract by a Debtor-in-Possession is an act of administration creating an obligation of the estate which is legally distinct from the obligations that existed prior to an assumption of the contract." Samore v. Boswell (In re Multech Corp.), 47 B.R. 747, 750 (Bankr. N.D. Iowa 1985). It follows that payment under the assumed contract is a cost of administration under 11 U.S.C. § 503(b)(1)(A).

However, the question before the court is whether a contract vendor of real estate may obtain an administrative expense allowance for the use and occupancy of the real estate during the course of the reorganization proceeding where the contract is not assumed, but there is a beneficial use of the property by the debtor-in-possession.

In this case, Neuhaus made an ineffective attempt to assume the contract. That attempted assumption, as outlined in the debtor's substituted plan of reorganization was not approved by the court either under a plan of reorganization or by order on a

separate motion of the debtor-in-possession. His indication of assumption was conditional upon confirmation of his plan.

Absent court approval, Neuhaus' attempted assumption is without legal validity. In re Marble Publishing Co. Inc., 20 B.R. 933, 935 (Bankr. E.D. Pa. 1982).

The real estate contract between Williams and Neuhaus has now been forfeited. Williams asked for the allowance and payment of an administrative expense for Neuhaus' post-petition use as debtor-in-possession of the property during the 1987 crop year under 11 U.S.C. § 503(b)(1)(A).

That Code section provides that:

"After notice and a hearing, there shall be allowed administrative expenses, . . . including--

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case."

Generally, the purpose of § 503 is to advance a debtor's efforts to reorganize by granting preferred status to creditors who provide goods or services to the debtor-in-possession. In re Jartran, Inc., 732 F.2d 584, 586 (7th Cir. 1984).

A workable criteria in examining a claim under 11 U.S.C. § 503 is (1) whether the claim arises from a transaction with a debtor-in-possession and (2) did the debt result in benefit to the debtor-in-possession in the operation of the business. Id. at 587, (citing In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976)).

Williams argue they are entitled to administrative treatment

for the use by Neuhaus, as debtor-in-possession, for the use of the real property during 1987.

Williams cite authority for the proposition that when a debtor-in-possession receives goods or services post-petition, the non-debtor party to the pre-petition executory contract is entitled to compensation as an administrative expense despite the fact that the contract is not assumed.

Prior to the 1984 amendment to § 365(d) of the Code, courts provided administrative priority to lessors for the debtor-in-possession's use and occupancy of the property in instances where the unexpired lease was not assumed. 3 COLLIER ON BANKRUPTCY § 503.04(ii), 14 at 503-24 to 503-25.

As to non-residential real estate, the 1984 amendments to the Code provided that a debtor-in-possession shall timely perform all the obligations of the debtor arising from and after the order for relief under any unexpired lease until the lease is assumed or rejected notwithstanding § 503(b)(1). 11 U.S.C. § 365(d)(3).

Congress did not amend 11 U.S.C. § 365 to provide similar treatment for the non-debtor party to an executory contract for the purchase of real estate.

This court is mindful that the United States Supreme Court has said that "[i]f the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services, (citation omitted) which, depending on the circumstances

of a particular contract, may be what is specified in the contract (citation omitted). National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 531 (1984).

Williams would have that principle extended to the use of real property being purchased on contract, despite the fact that in such a case no new goods or services are being provided post-petition, and the debtor-in-possession succeeds to possession of the property pursuant to the Code.

Neuhaus argues that while the debtor-in-possession may have benefited, there has been no showing by Williams that they incurred an expense or contributed any new money or property.

The use of the collateral post-petition by the debtor-in-possession generally does not require administrative priority treatment for secured creditors under § 503(b)(1). In re Provincetown-Boston Airline, Inc., 66 B.R. 632, 634 (Bankr. M.D. Fla. 1986); In re Briggs Transportation Co., 47 B.R. 6, 7 (Bankr. Minn. 1984).

This court does not believe, however, that 11 U.S.C. § 503(b)(1)(A) should be read in this case without reference to the underlying purpose of 11 U.S.C. § 365.

Section 365 permits the Trustee (debtor-in-possession) to assume those contracts and leases of the debtor which benefit the estate and to reject those which are burdensome and unfavorable. In re G-N Partners, 48 B.R. 462, 465 (Bankr. Minn. 1985).

One of the benefits of the contract in question is the possession and use of the property for the operation of the farm

business. The debtor-in-possession in this case would selectively benefit without any concomitant cost. While the debtor-in-possession may be able to reject an unfavorable executory contract of the debtor, he should not actively obtain the benefits of that contract while making up his mind whether to assume or reject, and perhaps as may be the case here, delaying assumption and cure.

This court does not believe that where an executory contract for the sale of land is concerned, the debtor-in-possession may use the property and later reject the contract without cost.

The allowance and payment of the administrative expense equal to the benefit to the debtor-in-possession is an appropriate method to compensate the vendor.

The administrative claim, however, should be determined in light of the benefit to the debtor-in-possession and not the detriment to the creditor. In re Intran Corp., 62 B.R. 435, 436 (Bankr. D. Minn. 1986). Compensating creditors for their injuries due to the use of the property or the injury, if any, caused by the automatic stay, is more appropriately accomplished under adequate protection portions of the Code.

This court believes that the fair rental value of the real property is an acceptable, workable and equitable gauge of the benefit to the debtor-in-possession for the use of the real property pending a decision to assume or reject an executory contract for the sale of land.

Both Neuhaus and Mr. Williams testified as to the fair rental value of this farm. Mr. Williams testified based on an offer which

was received by him to rent the property but which was later withdrawn. His testimony was contradictory as to the inclusion or exclusion of certain buildings within the parameters of the offer.

Neuhaus, on the other hand, testified as to his belief as to the fair rental value of the farm comparing it to similar farms and the going rate in the area.

This court believes that the evidence offered by Neuhaus was more credible.

The court has, therefore, found in Finding No. 31, that the fair rental value of this farm for the 1987 crop year was \$14,400.00. In arriving at that figure, the court has allowed 160 acres X \$90 per acre and included all buildings in the rental price. Williams' only evidence was that of the oral offer, and it was unclear to this court as to how the terms of that offer involved the farm buildings and house.

The court will, therefore, allow Williams the sum of \$14,400.00 as an administrative expense for the use by the debtor of the real estate during the 1987 crop year.

III.

Williams have also made a motion for adequate protection. The essence of that motion, however, is that the motion filed November 13, 1987 (Contested No. 71511) argues that the Chapter 12 filing and the automatic stay have prevented Williams from renting the property to another and that that interest in the debtor entitled to adequate protection under 11 U.S.C. § § 362 and 363.

This court does not believe this is anything more than an argument that Williams be protected as to a lost opportunity.

The ability to regain the property and rent to someone else is not an interest entitled to adequate protection under 11 U.S.C. § 362(d)(1) or § 363. United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

The motion for adequate protection filed by Williams will be denied.

CONCLUSIONS


1. The benefit to the debtor-in-possession for the use of property which is the subject of an executory land sale contract, pending assumption or rejection of that contract, is an allowable administrative expense under 11 U.S.C. § 503(b)(1)(A).

2. The contract vendor of the executory real estate contract is not entitled to adequate protection under 11 U.S.C. § 1205(b)(3) merely because of the vendor's inability to rent the land to one other than the debtor-in-possession.

IT IS THEREFORE ORDERED that Charles Williams, Jr. and Marie Williams' Application for the Allowance and Payment of Administrative Expense is granted in the amount of \$14,400.00. Transcript costs are taxed to Williams.

Judgment shall enter accordingly.

SO ORDERED ON THIS 27 DAY OF MAY, 1988.


William L. Edmonds, Bankruptcy Judge

copies to:

U. S. Trustee

George Keith

John R. Cronin

Michael P. Mallaney and

Mark S. Lawrence

U. S. Trustee

Carol Dunbar

on 5/22/88, *LM*